No. 88-1280 (2)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

PENNSYLVANIA INDEPENDENT PETROLEUM PRODUCERS,
a non-profit corporation,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, and NICHOLAS DeBENEDICTIS, Secretary of Department of Environmental Resources of the Commonwealth of Pennsylvania,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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STATEMENT OF THE CASE

Petitioner's action was commenced in the Commonwealth Court of Pennsylvania and sought a declaratory judgment that Pennsylvania's Oil and Gas Act, Act of Dec. 19, 1984, P.L. 1140, as amended, 58 P.S. §§ 601.101 - 6101.605, was unconstitutional. Commonwealth Court entered summary judgment in the respondents' favor on May 11, 1987, holding that the Act was Constitutional. The Pennsylvania Supreme Court affirmed in a per curiam Order dated November 14, 1988, with one Justice dissenting (without opinion).

Prior to the passage of the act in question, the industry was governed by the Gas Operations Well-Drilling Petroleum and Coal Mining Act, the Act of Nov. 30, 1955, P.L. 756, No. 225, as

amended, 52 P.S. § 2101 et seq. (repealed). Thus, the oil and gas industry in Pennsylvania has been pervasively regulated for many years.

Petitioner originally challenged seven specific provisions of the Oil and Gas Act and the entire Act as well. Commonwealth Court held that Petitioner's challenges, for the most part, were premature because of the lack of an actual case or controversy.[1]

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[1]Petitioner's challenges to Section 215, bond requirements, to the legislative delegation of rule making powers under Section 509 and its challenge to the entire Act on the grounds of unlawful commingling were decided on the merits.

Petitioner now challenges only Section 208 (water pollution presumption), Section 508 (material and witness production and administrative searches) and Section 212 (records required to be maintained and reports required to filed).

Section 208 provides for a rebuttable civil presumption that a well operator is responsible for pollution of a water supply that is within 1000 feet of an oil and gas well occurring within six months after the completion of drilling or alteration of the well.

Section 508 provides for warrantless administrative inspections of commercial premises, not homes, and records and provides further that upon refusal of the operator to grant access, the Department's agent or employee may

obtain a search warrant or other suitable order authorizing entry and inspection.

Section 212 requires the making, maintaining and filing with the Department records and reports on well production, completion and cessation, drill cuttings and other geological information, and a variety of other technical matters.

ARGUMENT

The Pennsylvania Supreme Court's Decision Affirming the Grant of Summary Judgment for the Respondent Presents Neither the Existance of a True and Significant Conflict Worthy of this Court's Review nor any Special or Important Reasons for It.

1. SECTION 208's PRESUMPTION OF POLLUTION IS USED BY THE DEPARTMENT ONLY TO DETERMINE WHETHER TO ISSUE AN ADMINISTRATIVE ORDER. NEITHER SECTION 208 NOR THE ACT IN TOTO SHIFTS THE BURDEN OF PROOF IN CRIMINAL PROCEEDINGS.

The mere fact that the Act includes criminal sanctions for its violation does not, whatever Petitioner may say, convert it into a penal statute. New York v. Burger, 482 U.S. ____, 107 S.Ct. 2636, 96 L.Ed. 2d 601 (1987); Masland v. Bachman, 473 Pa. 280, 374 A.2d 517 (1977); Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974). In Burger this Court held that "an administrative

statute establishes how a particular business in a 'closely regulated' industry should be operated, setting forth rules to guide an operator's conduct of the business and allowing government officials to ensure that those rules are followed." 107 S.Ct. at 2649, 96 L.Ed. 2d at 620. The statute in Burger, like the Oil and Gas Act, provided that certain administrative violations constituted a misdemeanor, 107 S.Ct. at 2651, n. 25, 96 L.Ed. 2d at 622, n. 25, but this Court rejected the idea that it thereby became a penal statute. It noted that "a state can address a major social problem both by way of an administrative scheme and through penal sanctions." Id. Thus, the inclusion of civil and criminal sanctions, as necessary means to assure enforcement of the Act, does not change

the basic regulatory objectives and nature of the Oil and Gas Act nor require that its provisions be judged by any stricter standards which might apply to criminal enactments.

Petitioner maintains that the rebuttable presumption contained in Section 208 of the Act, 58 P.S. § 601.208, will allow unconstitutional criminal prosecutions. Section 208 provides that any well operator who affects a public or private water supply shall restore or replace the affected supply. It further provides, in subsection (c), that:

> (c) Unless rebutted by one of the five defenses established in subsection (d), it shall be presumed that a well operator is responsible for the pollution of a water supply

> that is within 1,000 feet of the oil or gas well, where the pollution occurred within six months after the completion of drilling or alteration of such well.

If the Department, by using this presumption, determines that the well operator is responsible for pollution or water loss, then it may issue orders to the well operator to restore or replace the water supply.[2] Section 208(b).

The operator may appeal such an order to the state Environmental Hearing

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[2]The presumption may be rebutted by a showing that (1) the pollution existed prior to the drilling or alteration activity as determined by a predrilling or prealteration survey or (2) the landowner or water purveyor refused to allow the operator access to conduct a predrilling or prealteration survey or (3) the water supply is not within 1,000 feet of the well or (4) the pollution occurred more than six months after completion of drilling or alteration activities or (5) the pollution occurred as the result of some cause other than the drilling or alteration activity. Section 208(d).

Board (EHB), which may grant a supersedeas. The Administrative Code, Act of April 9, 1929, P.L. 177, Art. XIX-A, § 1921-A(c) and (d) added by Act of Dec. 3, 1970, P.L. 834, No. 275, 71 P.S. § 510-21.

Section 208 clearly sets forth a civil remedy. The presumption is used by the Department to order replacement or restoration of a water supply. The operator can contest that presumption by raising any one of five defenses that rebut the civil presumption, and can raise these defenses to the Department or in an appeal before the EHB.

Nothing in Section 208 purports to change existing principles of criminal law; it only establishes a rebuttable presumption used in determining whether the Department should order a well operator to restore a water supply. Nothing in Section 208 purports to shift

the burden of proof in a criminal proceeding; the Department must still prove any alleged criminal conduct in accordance with principles of criminal law, whenever it institutes criminal proceedings. Also, the Department has constistently acknowledged this. Appendix p. 8a. Petitioner has simply misconstrued the effect of Section 208.

Even more importantly, Petitioner has failed to allege any instance in which the Department has instituted a criminal proceeding against anyone based upon Section 208 of the Act. There is no assertion that anyone is faced with criminal prosecution in which the burden of proof has been shifted. Petitioner does not have a justiciable interest in this matter, since its interest is not direct or substantial, but instead is

speculative and remote. See Apartment Owners and Managers Committee v. Brown, 487 Pa. 548, 410 A.2d 747 (1980)(holding that no actual case or controversy was presented even where District Attorney publicly announced that he would criminally prosecute for certain conduct).

The cases Petitioner cites in its Petition are inapposite. In re Winship, 397 U.S. 358 (1970) involved an actual attempt to adjudicate a child as delinquent. Sandstrom v. Montana, 442 U.S. 510 (1978), involved an actual criminal prosecution. Here there are no actual or threatened prosecutions, only Petitioner's unsupported speculation.

The constitutionality of this statute should be evaluated in the context of its actual application to a concrete situation. See Commonwealth v.

Maxwell, 505 Pa. 152, 477 A.2d 1309, 1318 (1984), cert. denied, Maxwell v. Pennsylvania, 105 S.Ct. 370 (1984) reh'g. denied, 105 S.Ct. 3516 (1985). The Pennsylvania courts, therefore, properly rejected Petitioner's challenge as premature.

2. SECTION 508 IS A CONSTITUTIONAL AUTHORIZATION OF WARRANTLESS ADMINISTRATIVE INSPECTIONS OF REGULATED PREMISES, NOT HOMES, IN AN INDUSTRY SO PERVASIVELY REGULATED THAT THE OWNERS AND OPERATORS CANNOT HAVE ANY EXPECTATION OF PRIVACY.

Petitioner also challenges the constitutionality of Section 508 of the Oil and Gas Act, 58 P.S. § 601.508, which provides for warrantless administrative inspections. This challenge is premature and, also, Section 508 is constitutionally sound.

A. It is Premature to Adjudicate the Constitutionality of Section 508 Absent any Allegation that it has been Applied in an Unconstitutional Manner.

Petitioner has not alleged that the Department of Environmental Resources has sought to gain access to any person's premises or records without his consent.

It is not appropriate to evaluate the constitutionality of the inspection provisions in a factual vacuum.

In evaluating administrative inspection laws, courts consider the cause upon which a warrant was issued, the scope of the warrant and inspection, the impact of the inspection, whether the person subject to the inspection is licensed, the grounds to be inspected, the existence of regulations implementing the statute, and the individual circumstances of an actual or attempted entry. See e.g. New York v. Burger, supra; Donovan v. Dewey, 452 U.S. 594 (1981); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). Each of these factors has a significant bearing

on the constitutional issue, and none can be determined in the abstract.

In Younger v. Harris, 401 U.S. 37 (1971), this Court noted that there are serious problems in invalidating a provision before the state has the opportunity to apply it, or to propose regulations that define it:

> [T]he States would then be stripped of all power to prosecute even the socially dangerous and constitutionally unprotected conduct that had been covered by the statute, until a new statute could be passed by the state legislature and approved by the federal courts in potentially lengthy trial and appellate proceedings.

Younger, 401 U.S. at 51. This principle, applied to the right of free speech, also should be applied to this situation where Fourth Amendment concerns have been speculatively raised.

B. Section 508's Authorization of a Warrantless Administrative Inspection of Commercial Premises and Records is Constitutionally Permissible.

In the alternative, the Department submits that Section 508 is constitutional. This Court has recently made it clear that warrantless administrative inspections of commercial premises, pursuant to a state regulatory scheme, do not offend against the Fourth Amendment. New York v. Burger, supra.

In Burger this Court held that the owner or operator of commericial premises in a "closely regulated" industry has a reduced expectation of privacy, and that the "warrant and probable cause requirements, which fulfill the traditional Fourth Amendment

standard of reasonableness for a government search, have lessened application in this context". Id., 107 S.Ct. at 2643, 96 L.Ed.2d at 613.

Burger, requires that the industry be closely regulated, that there be a substantial governmental interest in the regulatory scheme, that warrantless inspections are necessary to further the regulatory scheme and that the statute's inspection program must provide a constitutionally adequate substitute for a search warrant. Burger, 107 S.Ct. at 2644. The Oil and Gas Act easily complies with this.

Here, the oil and gas industry is closely regulated, even more closely regulated than junkyards. There is also a very substantial governmental interest in the regulatory scheme embodied in the Oil and Gas Act. For example, sections

207, 214, 208 and 209 of the Act deal with the prevention of pollution of groundwater by drilling, the coordination of coal mining activities in the vicinity of wells, the prevention of migration of oil and gas into water-bearing strata or mines, the prevention of blowouts, explosions and fires, and the protection of public and private water supplies. It is also the case that warrantless inspections are necessary to further the regulatory scheme. It is easy to conceal the evidence of improper, unlawful practices and unannounced inspections are essential "if inspection is to be effective and serve as a credible deterrent." Burger, 107 S.Ct. at 2648; Donovan v. Dewey, 452 U.S. at 603.

The Act and the Department's inspection policy,[3] published at 17 Pa. Bulletin 3235 (Aug. 1, 1987)(copy attached hereto as Appendix A), provide a constitutionally adequate substitute for a search warrant. The statute is "sufficiently comprehensive and defined" that the operator" cannot help but be aware that his property will be subject to periodic inspection undertaken for specific purposes" and, the statute "limit[s] the discretion of the inspecting officers." Burger, 107 S.Ct at 2644.[4]

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[3]A Court can take judicial notice of a publication in the Pa. Bulletin. 42 Pa. C.S. § 506. The Court may also consider the Department's policy in evaluating the constitutionality of the statute. United States v. Kaiyo Maru No. 53, 699 F.2d 989 (9th Cir. 1983).

[4]Furthermore, the Department's published inspection policy, Appendix A

(FOOTNOTE CONTIUNED ON NEXT PAGE)

The administrative search provision of the Oil and Gas Act, § 508, is constitutional.

(FOOTNOTE CONTINUED)

hereto, further defines the frequency and circumstances under which an operator can expect an inspection. For instance, the policy provides for inspection once prior to the grant of inactive status, once during each of the phases of siting, drilling, casing or completing a well, once a year while on-site waste water brine disposal is conducted, and twice a year if a well is located in a gas storage reservoir protective area. The existence of this policy alone distinguishes this case from Commonwealth v. Lutz, 512 Pa. 192, 516 A.2d 339 (1986), vacated and remanded, 107 S.Ct. 1560 (1987), upon which Petitioner mistakenly relies.

3. SECTION 212 DOES NOT VIOLATE THE FIFTH AMENDMENT BECAUSE THE REQUIRED REPORTS ARE NOT INCRIMINATORY BY NATURE AND BECAUSE STATES MAY REQUIRE PERSONS ENGAGED IN LAWFUL ACTIVITIES TO MAKE, MAINTAIN AND FILE THE REPORTS REQUIRED TO ENFORCE THE LAW.

Section 212 of the Act, 58 P.S. § 601.212, requires well operators to file reports on well production, completion and cessation; drill cuttings and other geological information; and a variety of other technical matters, if compiled in the ordinary course of business. The Department must keep this information confidential for one year, or five years if the operator requests it, but may of course use this information in enforcement proceedings. Section 212(a). Petitioner argues that these requirements violate the Fifth Amendment right against self-incrimination.

Once again Petitioner's claim is entirely theoretical, speculative and abstract. No criminal proceedings are pending, no reports have been sought for use in such proceedings, and no individual has invoked the privilege. Again, the Court should decline to decide constitutional questions in the abstract.

In any event, Petitioner's argument is very nearly frivolous. Regulatory reporting requirements have been repeatedly upheld against self-incrimination challenges. In California v. Byers, 402 U.S. 424 (1971), this Court upheld a statute requiring a "driver of a motor vehicle involved in an accident to stop at the scene and give his name and address." 402 U.S. at 425. This Court stated:

> An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; ... industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere. Comparable examples are legion.
>
> In each of these situations there is some possibility of prosecution--often a very real one--for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be "a link in the chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.

Byers, 402 U.S. at 427-428. Accord Shapiro v. United States, 335 U.S. 1 (1948) (records required to be kept by statute not covered by privilege against self-incrimination); Wilson v. United States, 221 U.S. 361 (1911)(same).

The cases Petitioner relies on are inapposite. Marchetti v. United States, 390 U.S. 39 (1968) and Grosso v. United States, 390 U.S. 62 (1968) both involved attempts by the government to extract admissions of gambling, an endeavor which the Court found to be fundamentally a matter of criminal rather than regulatory enforcement. Boyd v. United States, 116 U.S. 616 (1885) and United States v. Doe, 465 U.S. 605 (1984), both involved private records not required to be kept by statute.

There is no question that the state has a legitimate objective in requiring the reports described in Section 212. It is important for environmental and safety concerns to know whether wells have been completed,

where they are, and whether they are producing. To take only one example, coal mining and oil and gas drilling often take place in the same area. As miners approach gas and oil wells, it is important to know whether gas is present that could be ignited and cause catastrophe to the workers in the mines and at the well sites. The reporting requirements are constitutional, and they present no issue to justify review by this Court.

CONCLUSION

Petitioner has failed to demonstrate the existence of a true and significant conflict worthy of this Court's review as required by Supreme Court Rule 17. There being no special or important reasons therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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TITLE 25. ENVIRONMENTAL RESOURCES

PART I. DEPARTMENT OF ENVIRONMENTAL RESOURCES

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 78. INSPECTION POLICY REGARDING OIL AND GAS ACTIVITIES-STATEMENT OF POLICY

Sec.

78.1 Definitions.
78.2 Policy.
78.3 Frequency of inspections.
78.4 Manner of inspection.
78.5 Additional inspections.
78.6 Limitation.

§ 78.1 Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Department--The Department of Environmental Resources of the Commonwealth.

NGPA--Natural Gas Policy Act of 1978 (15 U.S.C.A. §§ 3301-3432 and 42 U.S.C.A. § 7255).

§ 78.2. Policy.

(a) This chapter sets forth the policy of the Department in regard to inspections of oil and gas well locations, sites, property, facilities, operations or activities governed by the Oil and Gas Act (58 P.S. §§ 601.101-601.605), the Coal and Gas Resource Coordination Act (58 P.S. §§ 501-518) or the Oil and Gas Conservation Law (58 P.S. §§ 401-419). This policy does not create a duty or obligation upon the Department to conduct a minimum or maximum number of inspections per year or during a certain period of time.

(b) Inspections are conducted to administer, implement, enforce and determine compliance with the statutes

set forth in subsection (a) and with Article XIX-A of The Administrative Code of 1929 (71 P.S. §§ 510-1--510-108), The Clean Streams Law (35 P.S. §§ 691.1-691.1001) and the Solid Waste Management Act (35 P.S. §§ 6018.101-6018.1003) and other statutes administered by the Department that apply to activities associated with gas and oil operations.

§ 78.3. Frequency of inspections.

The Department, its employes and agents intend to conduct inspections at the following frequencies:

(1) At least once prior to the issuance of a permit, if a waiver or exceptions is requested by the permit applicant.

(2) At least once in verifying or resolving objections or determining the Department's response to objections,

when objections are raised to a permit application.

(3) At least once during each of the phases of siting, drilling, casing, cementing, completing, altering and stimulating a well.

(4) At least once during, or within 3 months after, the time period in which the owner or operator is required to restore the site, after drilling the well.

(5) At least once prior to the authorization to use an alternate method for plugging, casing or equipping the well.

(6) At least once during the periods that an alternative method for plugging, casing or equipping the well is being used or installed.

(7) At least once when a well is being reconditioned or repaired or when casing is being replaced.

(8) At least once prior to a well being granted inactive status.

(9) At least once during the plugging of the well.

(10) At least once during, or within 3 months after, the period in which the owner or operator is required to restore the site, after the well is plugged or abandoned.

(11) At least once before the bond or other financial security is released.

(12) At least once a year, if there is onsite brine disposal or residual waste disposal subject to the statutes referenced in § 78.2 (relating to policy).

(13) At least twice a year if the well is located in a gas storage reservoir or in a gas storage reservoir protective area.

(14) At least once a year to determine whether compliance with the statutes administered by the Department has been achieved.

(15) If there is a violation, at least once to determine whether the violation has been corrected, or whether there is a continuing violation.

(16) At least once, in response to a complaint.

(17) At least once prior to the issuance of an NGPA determination.

§ 78.4. Manner of inspection.

The inspections described in this chapter may be conducted separately, or in combination, whichever manner is deemed by the Department to permit maximum efficiency, accuracy and thoroughness in implementing the statutes administered by the Department.

§ 78.5. Additional inspections.

The Department, its employes and agents may conduct additional inspections, including follow-up inspections, inspections to observe a practice or condition related to the public health or safety and inspections to determine compliance with the statutes set forth in § 78.2 (relating to policy), with the laws administered by the Department, with the Department's regulations, with the terms or conditions of a permit or with the requirements of an order.

§ 78.6. Limitation.

The provisions of this chapter are subject to the availability of personnel and financial resources. This chapter does not create a duty or obligation upon the Department to conduct a

minimum or maximum number of inspections per year or during a certain period.

(Pa.B. Doc. No. 87-1213. Filed July 31, 1987, 9:00 a.m.)